

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 18, 2007

CALVIN LEWIS HILL v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Marshall County
No. 17139 Robert Crigler, Judge**

No. M2007-00934-CCA-R3-PC - Filed May 6, 2008

Petitioner, Calvin Lewis Hill, appeals the dismissal of his petition for post-conviction relief in which he alleged that his trial counsel rendered ineffective assistance of counsel. Specifically, Petitioner contends that trial counsel's tactical decision not to object to certain testimony presented at trial was based on improper investigation. After a thorough review of the record, we conclude that Petitioner has failed to show that his trial counsel rendered ineffective assistance and affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and J. C. McLIN, JJ., joined.

Robert L. Marlow, Shelbyville, Tennessee, for the appellant, Calvin Lewis Hill.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Following a jury trial, Petitioner was convicted of burglary and theft of property valued between \$500.00 and \$1,000.00. The facts surrounding Petitioner's convictions were summarized by this Court in the direct appeal as follows:

Linda Salway testified that she was a member of the Lighthouse Independent Baptist Church in Lewisburg and that the pastor of the church was Reverend Steven Leathers. On Sunday, April 20, 2003, the church had a guest speaker for its Sunday school, 11:00 a.m. worship service, and 6:00 p.m. worship service. Ms. Salway stated

that a large plastic water jug was in the front of the church sanctuary, that church members put money in the jug, and that the jug was about one-half full of coins and five-dollar, ten-dollar, and twenty-dollar bills.

Ms. Salway testified that after the 11:00 a.m. service on April 20, she saw the appellant outside and learned that he needed a place to stay. That evening, Ms. Salway returned to the church for the 6:00 p.m. service. Reverend Leathers was sitting in a pew a couple of rows back from the guest speaker. During the service, the appellant came into the church, sat in front of Reverend Leathers, and turned around and began speaking to the reverend. Reverend Leathers said something to the appellant, and the appellant turned around and faced the front of the church. Ms. Salway stated that after the evening service was over, everyone left the church and the church was locked for the night. She said that the money jug had been in the sanctuary at the end of the 6:00 p.m. service and that she never saw the appellant go near the jug.

About 7:00 a.m. on April 21, Ms. Salway received a telephone call from the church custodian. In response to the call, Ms. Salway telephoned another church member, Lyle Alwardt, and asked him to meet her at the church. When they arrived, Ms. Salway and Mr. Alwardt walked to the back of the church and saw that a basement, ground-level window had been broken. Ms. Salway and Mr. Alwardt went into the church sanctuary and discovered that the money jug was gone. A tablecloth that had been in the basement was also missing, and Ms. Salway telephoned the police. Later that day, Ms. Salway searched along some railroad tracks near the church and found the money jug, which was empty except for a one-dollar bill. On cross-examination, Ms. Salway testified that she had never counted the money in the jug but that she had moved the jug and it was very heavy.

Lyle Alwardt testified that he was a member of the Lighthouse Independent Baptist Church. On the morning of April 20, 2003, he saw an African-American male sitting in the church. He gave the man a visitor card, and the man filled it out. During the 11:00 a.m. worship service, Mr. Alwardt passed the man a collection plate. The man emptied his pockets and put a nickle and four pennies in the plate. After the service, the man followed Reverend Leathers "like a shadow." Mr. Alwardt said that the man never went near the money jug, which was at the front of the sanctuary.

Mr. Alwardt testified that he returned to the church later that day for the evening service. After the service started, the African-American man came into the sanctuary, sat in front of Reverend Leathers, and kept turning around and talking to the reverend. After the service, Reverend Leathers and the man went into the pastor's office. The next morning, Mr. Alwardt received a telephone call from Linda Salway and went to the church. He and Ms. Salway walked around the outside of the building and saw that a basement window had been broken. When they went inside the

church, Mr. Alwardt and Ms. Salway discovered that the money jug was gone. Mr. Alwardt testified that the jug had been one-half full of coins and paper money.

Steven Leathers testified that he was the reverend of the Lighthouse Independent Baptist Church. On April 20, 2003, Reverend Leathers arrived at the church before Sunday school and went into his office. The appellant knocked on the door, came in, and told Reverend Leathers that he had no money and needed financial help. Reverend Leathers and the appellant then went into the sanctuary for Sunday school and the 11:00 a.m. church service. After the 11:00 a.m. service, Reverend Leathers gave the appellant five dollars and dropped him off at McDonald's. Reverend Leathers also told the appellant to return to the church for the evening worship service.

Reverend Leathers testified that the appellant had told him that the appellant was staying at the Richland Motel. Reverend Leathers telephoned the motel, and someone there told him that another church also had been helping the appellant. Reverend Leathers returned to the church that evening for the 6:00 p.m. service. The appellant came to the service late, sat in front of Reverend Leathers, and began talking to him. Reverend Leathers related that he told the appellant to be quiet. He said that the appellant kept talking and that he told the appellant to shut up. After the service, Reverend Leathers told the appellant that the church could not help him, and the appellant left. Reverend Leathers testified that he never saw the appellant touch the money jug. He stated that the church had collected money in a similar jug before and that the first jug contained \$500 or \$600 when it was emptied. He said the first jug contained mostly coins but could not remember how full the jug had been when it was emptied. He said that unlike the first jug, the jug in the present case contained more ten- and twenty-dollar bills. He stated that he had put about \$250 in the stolen jug, and he estimated that it had contained about \$800.

Officer Billy Duckworth of the Lewisburg City Police Department testified that he was dispatched to the Lighthouse Independent Baptist Church on the morning of April 21, 2003. He arrived about 7:15 a.m., walked to the back of the church, and saw that a ground-level window had been broken. Officer Duckworth then went into the church with Ms. Salway, and Ms. Salway showed him where the money jug had been. Officer Duckworth spoke with Reverend Leathers, and Reverend Leathers gave him the appellant's name. Officer Duckworth saw the appellant later that day and drove the appellant to the police department. On cross-examination, Officer Duckworth testified that he went into the appellant's motel room and saw some change on a nightstand. He said that the change was worth \$3 to \$4 and that he did not find any paper money. Officer Duckworth also saw two metal cans in the room.

Detective Kevin Patin of the Lewisburg City Police Department testified that he was dispatched to the church on April 21. He inspected the broken window,

spoke with Officer Duckworth, and learned that the appellant had attended church the night before and had tried to get money from Reverend Leathers. Later that day, Detective Patin learned that the appellant had been taken to the police department. By the time Detective Patin arrived at the police department, another detective was already interviewing the appellant. Detective Patin testified that when the appellant was arrested, the appellant had \$220 on his person. The appellant also had a deposit slip on his person, showing that the appellant had made a \$30 deposit to his savings account that morning. Detective Patin fingerprinted the appellant. Around lunchtime, Detective Patin received a telephone call from Linda Salway and returned to the church. Ms. Salway showed Detective Patin the water jug that Ms. Salway had found near the railroad tracks. Detective Patin dusted the jug for fingerprints.

Agent David Houston Hoover of the Tennessee Bureau of Investigation Crime Laboratory testified that he was a special agent forensic scientist assigned to the latent print section of the laboratory. He compared the appellant's fingerprints to a palm print recovered from the water jug and concluded that the appellant's right palm print matched the palm print recovered from the jug. He related that a fingerprint recovered from the jug did not match the appellant.

Dena Henson testified that she was the branch supervisor and head teller for the First Farmers and Merchants National Bank. The appellant was a customer at the bank, and Ms. Henson had waited on the appellant before. On the morning of April 21, 2003, the appellant brought a Folgers coffee can full of change into the bank to be counted. The change was worth about \$125, and Ms. Henson gave the appellant a \$100 bill and some smaller bills. About an hour later, the appellant returned with two more coffee cans. One of the cans was full of change and the other can was one-half full. The change was worth about \$100, and Ms. Henson gave the appellant another \$100 bill. Ms. Henson related that while the appellant was waiting on the change to be counted, he paced back and forth in the lobby and acted nervous. She stated that the appellant had never before brought large amounts of change into the bank. When the prosecutor showed Ms. Henson the money that was found on the appellant's person, Ms. Henson stated that none of the bills were \$100 bills.

Tommy Allen testified for the appellant that the appellant did painting work for him in April 2003. He stated that the appellant worked for him for about two weeks, that he paid the appellant \$50 to \$80 per day, and that he always paid the appellant in cash. He estimated that he had paid the appellant a total of \$200 to \$300.

State v. Calvin Lewis Hill, No. M2004-15857-CCA-R3-CD, 2005 WL 2255544, at *1 -3 (Tenn. Crim. App., at Nashville, Aug. 23, 2005), *perm. to appeal denied* (Tenn. Jan. 3, 2006).

II. Post-conviction Hearing

At the post-conviction hearing, Petitioner testified that trial counsel was appointed to represent him, and that he and trial counsel met two or three times prior to trial. Petitioner stated that trial counsel's performance was deficient because he failed to secure defense witnesses for trial who would testify that Thomas Jackson Tucker had confessed to breaking into the Lighthouse Independent Baptist Church. Petitioner acknowledged that trial counsel made an offer of proof at trial as to Mr. Tucker's proposed testimony, and that the trial court found the testimony inadmissible on relevancy grounds because Mr. Tucker denied making the statement. Petitioner also acknowledged that in another offer of proof, Daniel Proctor testified that he had heard Mr. Tucker admit that he had committed the offenses. Moreover, Petitioner conceded that this issue was addressed on appeal. A panel of this Court found that the trial court erred in ruling Mr. Tucker's testimony inadmissible, but that such error was harmless. *Calvin Lewis Hill*, 2005 WL 2255544, at *3.

Petitioner also testified that trial counsel should have requested that Petitioner provide a DNA sample. Petitioner did not recall whether trial counsel told him that the State did not have any DNA evidence from the crime scene.

Petitioner maintained that trial counsel's performance was deficient because he failed to obtain the video tape from the security camera at the First Farmers and Merchants National Bank. Dena Henson, a teller at the bank, testified at trial that Petitioner visited the bank on two separate occasions on April 21, 2003, and exchanged coins for paper currency. Ms. Henson testified that while Petitioner waited for the change to be counted, "he paced back and forth in the lobby and acted nervous." *Id.*, 2005 WL 2255544, at *3. Petitioner stated that the video tape would have disputed this portion of her testimony.

Trial counsel testified that he was appointed to represent Petitioner in 2004. Trial counsel was informed that the State did not intend to introduce any DNA evidence. Trial counsel was aware that Petitioner's palm print was found on the money jar that was stolen. Trial counsel's present recollection was that he asked to review the bank's security tape, but that he did not believe that a tape existed at the time of his request. Trial counsel and Petitioner discussed trial strategy, including Petitioner's explanation of his possession of the coins, and the difficulty presented by the presence of his palm print on the money jar. Trial counsel stated that he subpoenaed five or six inmates to testify about Mr. Tucker's admission that he committed the offenses.

Trial counsel acknowledged that he did not object to Reverend Leather's testimony on direct examination concerning the amount of money in the stolen jar. As part of his trial strategy, trial counsel planned to challenge Reverend Leather's opinion on value on cross-examination because the previous money jar, which had been counted and deposited prior to the burglary, was fuller than the stolen jar and contained only \$500.00 to \$600.00. Trial counsel candidly acknowledged that his strategy was hindered by Reverend Leather's testimony that the second jar contained his personal contribution of \$250.00 and that the second jar contained more paper currency than coins.

III. Standard of Review

A petitioner seeking post-conviction relief must establish his allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). However, the trial court's application of the law to the facts is reviewed *de novo*, without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). A claim that counsel rendered ineffective assistance is a mixed question of fact and law and therefore also subject to *de novo* review. *Id.*; *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must establish that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In addition, he must show that counsel's ineffective performance actually adversely impacted his defense. *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). In reviewing counsel's performance, the distortions of hindsight must be avoided, and this Court will not second-guess counsel's decisions regarding trial strategies and tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The reviewing court, therefore, should not conclude that a particular act or omission by counsel is unreasonable merely because the strategy was unsuccessful. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Rather, counsel's alleged errors should be judged from counsel's perspective at the point of time they were made in light of all the facts and circumstances at that time. *Id.* at 690, 104 S. Ct. at 2066.

A petitioner must satisfy both prongs of the *Strickland* test before he or she may prevail on a claim of ineffective assistance of counsel. *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). That is, a petitioner must not only show that his counsel's performance fell below acceptable standards, but that such performance was prejudicial to the petitioner. *Id.* Failure to satisfy either prong will result in the denial of relief. *Id.* Accordingly, this Court need not address one of the components if the petitioner fails to establish the other. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

IV. Analysis

The sole issue presented on appeal challenges the post-conviction court's finding that trial counsel's decision not to object to Reverend Leathers' testimony concerning the amount of money stolen was based on tactical strategy and did not rise to the level of ineffective assistance of counsel. Petitioner contends that trial counsel's tactical decision in this regard was based on an inadequate investigation thereby rendering his performance deficient. Petitioner argues that if trial counsel had interviewed Reverend Leathers prior to trial about the value of the stolen money, trial counsel would have modified his trial strategy and objected to Reverend Leathers' testimony. Petitioner submits that such objection would have been sustained because Reverend Leathers' lay opinion as to the amount of money in the jar was "pure speculation."

"A witness may testify to the value of the witness's own property or services." Tenn. R.

Evid. 701(b). Petitioner does not challenge Reverend Leathers' qualifications to testify on behalf of the church as to the value of the money stolen. *See State v. Joseph Hough*, No. 03C01-9404-CR-00143, 1995 WL 358070 (Tenn. Crim. App., at Knoxville, June 13, 1995), *no perm. to appeal filed* (concluding that "while the [Hillcrest Baptist Church] is a legal entity, it has no 'owner'" other than its members, and that a member of the church was qualified to state an opinion as to the value of the stolen property").

Trial counsel testified that he and Petitioner reviewed the State's discovery which listed Reverend Leathers as a potential witness. It is not clear from the record whether trial counsel interviewed Reverend Leathers prior to trial. However, Reverend Leathers described in detail the analysis supporting his valuation of the stolen money and arrived at an estimation of \$800. Trial counsel thoroughly cross-examined Reverend Leathers as to his estimation of value. Any speculative nature present in Reverend Leathers' valuation analysis goes to the weight of his testimony. On appeal, a panel of this Court held that Reverend Leathers' opinion of value was sufficient to support Petitioner's conviction of theft over \$500.

Based on our review of the record, we conclude that Petitioner has failed to establish that he was prejudiced by trial counsel's failure to object to any portion of Reverend Leathers' testimony. Petitioner is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE